

ASHIN SDN BHD

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v.

DATUK BANDAR KUALA LUMPUR & ORS

HIGH COURT MALAYA, KUALA LUMPUR

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RK NATHAN J

[SUIT NO: S2-21-108-1997]

6 APRIL 1999

CIVIL PROCEDURE: *Costs - Security for costs - Factors to be considered - Companies Act 1965, s. 351(1)*

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COMPANY LAW: *Suit by company - Security for costs - Factors to be considered - Whether application an act of oppression upon plaintiff - Companies Act 1965, s. 351(1)*

The plaintiff brought an action against the defendants, *inter alia*, for: (i) the reimbursement of RM3.59m it allegedly expended on the development plans of a project carried out by the third defendant, the Government of Malaysia, which was later awarded to the second defendant; and (ii) a declaration that the award of the project to the second defendant was void. The second defendant applied for security for costs of \$100,000 from the plaintiff under s. 351(1) of the Companies Act 1965 ('the Act'), contending that: (i) as the plaintiff's paid-up capital was only RM1.5m and it had spent RM3.59m, it was therefore insolvent; and (ii) no accounts had been filed by the plaintiff with the Registrar of Companies since 1984.

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The Deputy Registrar ordered the plaintiff to provide security for costs of RM37,000. Both the plaintiff and second defendants appealed. Due to an irregularity in the second defendant's notice of appeal, that appeal was adjourned and the court proceeded to hear the plaintiff's appeal.

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Held:

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[1] The grounds as relied upon by the second defendant did not merit an award for security for costs. The relevance of the plaintiff's accounts was not shown to the court. Neither had the second defendant challenged the plaintiff's averment that it had provided audited accounts for 1991-1994 nor had it sought discovery of the accounts.

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[2] The application for costs was clearly an act of oppression upon the plaintiff. If the plaintiff's allegations about the second defendant were true, the application for security was clearly being used to stifle the plaintiff's legitimate claim.

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- a* [3] Furthermore, the first and third defendants had not sought security for costs. There was also no counter-claim by the second defendant and the figure of RM100,000 appeared to be guess work rather than a calculated estimate of the costs.

- b* [Appeal allowed; Deputy Registrar's order set aside.]

Case(s) referred to:

New Zealand Insurance Co Ltd v. Ong Choon Lin [1992] 1 MLJ 185 (*refd*)

Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd [1973] 2 All ER 273 (*refd*)

Legislation referred to:

- c* Companies Act 1965, ss. 351(1)

Companies Act 1948 [UK], s. 447

For the appellant/2nd defendant - Gopi Seshadari (Vicky Wong with him); M/s Lee Hishammuddin

- d* *For the 1st defendant - B Thangaraj; M/s Thangaraj & Assoc*

For the respondent/plaintiff - Rizwan Borhan; M/s Hamid Sultan & Rakan-rakan

Reported by Anne Khoo

JUDGMENT

- e* **RK Nathan J:**

Facts

- f* The plaintiff sued the defendants for loss and damage suffered. The statement of claim pleaded in detail disclosed that the 3rd defendant announced that it would give first opportunity to any person who would submit a proposal for privatisation and development of a certain piece of land (the land). The plaintiff was the first to submit an application for the development plan for a mixed development project with related infrastructure facilities and amenities in the said land in 1984. Sometime in 1993, the plaintiff was informed by the
- g* Pentadbir Tanah Wilayah Persekutuan that the development plan for the said project was approved. The statement of claim showed that up to that stage the plaintiff had, upon the 3rd defendant's representation, spent a sum of RM3.59 million for the preparation of the development plan for the said project. Specific details in respect of this sum were pleaded. In spite of
- h* numerous letters to the 1st defendant to negotiate for the execution of the development plan for the said project, the 1st defendant did not respond. The plaintiff also pleaded that in breach of the representation, the 1st and 3rd defendants invited the plaintiff for a tender exercise. By a letter dated 10 September 1990 the plaintiff was invited to participate in the tender which
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the plaintiff did, together with the 2nd defendant and two other companies. The plaintiff alleged unfair practice by the 1st defendant in the award of the tender to the 2nd defendant.

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Plaintiff's Claim

The plaintiff, thus, *inter alia*, made a claim against the defendants for the said sum of RM3.59 million and for a declaration that the award of tender to the 2nd defendant is null and void on the basis that the 2nd defendant had wrongfully influenced the 1st and 3rd defendants to award the said tender to the 2nd defendant. In its defence the 2nd defendant alleged that it was not aware of the details of the development plan submitted by the plaintiff.

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Security For Costs

The 2nd defendant then filed an application to compel the plaintiff to provide security for costs in the sum of RM100,000 and that until the said sum was provided all further proceedings be stayed. The learned Deputy Registrar having heard submissions made an order on 13 October 1998 that the plaintiff do provide security for costs in the sum of RM37,000. The 2nd defendant being dissatisfied appealed to the judge in chambers (encl. 41). The plaintiff being dissatisfied with the said order also filed an appeal (encl. 40).

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On 2 December 1998 when both appeals came up before me, I pointed out an irregularity in the 2nd defendant's notice of appeal. Learned counsel for the 2nd defendant then applied for an adjournment to amend his notice of appeal and counsel for the plaintiff having no objections, I adjourned the said hearing to a later date.

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Parties then agreed to proceed with the plaintiff's appeal against the award of security for costs.

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Findings Of The Court

It is the 2nd defendant's contention that since the plaintiff's paid-up capital is only RM1.5 million which the 2nd defendant had ascertained after making a search at the Registrar of Companies, and since the plaintiff had spent RM3.59 million, it was therefore insolvent. Further it was argued that the search also showed that no financial accounts had been filed by the plaintiff with the Registrar of Companies since its incorporation in 1984 and hence there was no evidence that the plaintiff was generating income. By an order dated 4 March 1998 the plaintiff was required to produce documents that were referred to in its pleadings relating to the expenses amounting to RM3.59 million. The plaintiff was however only able to produce some of the documents.

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- a* Denying the allegation that it had not filed its accounts the plaintiff in its reply contended that it had, when submitting for the tender, produced audited accounts for the years 1991 - 1994.

Question Of Oppression

- b* Having heard the submissions of the parties I allowed the plaintiff's appeal with costs in the cause and set aside the learned Deputy Registrar's order that the plaintiff do provide security for costs.

The 2nd defendant has premised his plea for security for costs on two grounds:

- c* (1) That no accounts had been provided since incorporation.

- d* On this issue, whilst I have not been shown the relevance of having to provide the accounts since incorporation, the plaintiff has averred that it had provided the audited accounts for the years 1991 - 1994. No discovery has been sought by the 2nd defendant nor any other challenge made to this averment. Obviously the 1st and 3rd defendants must have been satisfied with the plaintiff's production of the said accounts and the plaintiff's impecuniosity if any, could not have been an issue, because the plaintiff was in any case allowed to tender.

- e* (2) That because it had spent more than its paid-up capital it is therefore insolvent.

If this is to be a ground for seeking security for costs, then a large portion of the companies in Malaysia will be hard put to trade because most of the companies would be in a similar position.

- f* To my mind this request for costs is clearly tantamount to an act of oppression upon the plaintiff. The court must always be wary of the hidden agenda of a party to litigation to seek an order for security for costs, in order to thwart litigation. In respect of the case before me I am not at all satisfied that the reasons given merited an award for security for costs.

- g* It is trite law that an appellate court will not interfere in the exercise of discretion by a lower court unless such an exercise of discretion had been premised on wrong grounds (see *New Zealand Insurance Co Ltd v. Ong Choon Lin* [1992] 1 MLJ 185 SC).

- h* It is obvious that this application for security for costs is made under s. 351(1) of the Companies Act 1965 which reads as follows:

- i* 351.(1) Where a company is plaintiff in any action or other legal proceeding the Court having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs and stay all proceedings until the security is given.

In *Sir Lindsay Parkinson & Co Ltd v. Triplan Ltd* [1973] 2 All ER 273 where the Court of Appeal was called upon to decide on a similar issue based on s. 447 of the Companies Act 1948 which is almost in identical terms with our s. 351(1), Lord Denning MR said at p. 285 as follows:

Turning now to the words of the statute, the important word is 'may'. That gives the judge a discretion whether to order security or not. There is no burden one way or the other. It is a discretion to be exercised in all the circumstances of the case.

He continued at the same page and at p. 286:

... The court might also consider whether the application for security was being used oppressively – so as to try and stifle a genuine claim. It would also consider whether the company's want of means has been brought about by any conduct by the defendants, such as delay in payment or delay in doing their part of the work.

In this case the plaintiff had made detailed allegations that the 2nd defendant had taken unfair advantage by influencing the 1st and 3rd defendants to award to itself the tender. The plaintiff has also averred that at the time the 2nd defendant applied for the said tender its paid-up capital was only RM25,000 and that it was at all material times a dormant company with no financial strength or technical skill to bid for the tender.

I am of the opinion that the 2nd defendant's conduct, if proven true, falls squarely within such conduct of the 2nd defendant that according to Lord Denning MR ought to bear scrutiny. If such allegation by the plaintiff is proven true clearly an application for security for costs is being used oppressively so as to try and stifle a legitimate claim by the plaintiff.

Another factor I take into account is that neither the 1st nor the 3rd defendants have sought security for costs. To my mind based on the facts so far presented if at all any party might have a reason to seek security it would be the 1st or 3rd defendants because the allegation seems to be that it was the 2nd defendant that influenced these other two parties. In the circumstances I consider their non-application for security as an additional factor that motivated me to allow this appeal.

Finally, there is no counterclaim to this action. The 2nd defendant merely asked for RM100,000 or such further sum as security for costs to defend this action. The plaintiff's claim in itself amounts to RM3.59 million. The learned Deputy Registrar only awarded RM37,000 as security for costs. In support of its claim for RM100,000 the 2nd defendant itemised its estimated costs as follows:

<i>a</i>	(a) All correspondence, perusing documents in preparation of the case	RM25,000.00
	(b) Attending Court for interlocutory matters (at a rate of RM120.000 per attendance) 20 days	RM 2,400.00
<i>b</i>	(c) Attending Court for the trial (at a rate of RM500.00 per attendance) 10 days	RM 5,000.00
<i>c</i>	(d) Preparation and overall getting-up	RM55,000.00
	(e) Photocopying charges	RM15,000.00

d Seriously looking into the figures stated therein, I am unable to find any evidence of justification in the affidavit in support of the application for security for costs affirmed by the 2nd defendant's director. To me it is more a figure based on guess work rather than an educated and calculated estimate of figures.

e It was on all these considerations that I made the order I did.

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